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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DEBRA F.

Petitioner,

vs.

STATE OF WISCONSIN

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of Wisconsin

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

DID THE WISCONSIN COURTS CORRECTLY HOLD THAT THE STANDARD OF PROOF FOR THE "ACTIVE EFFORTS" REQUIREMENT OF THE INDIAN CHILD WELFARE ACT IN A TERMINATION OF PARENTAL RIGHTS CASE IS CLEAR AND CONVINCING EVIDENCE WHERE CONGRESS CLEARLY OMITTED THE HIGHER CRIMINAL STANDARD OF PROOF FOR THAT SECTION OF THE STATUTE, WHILE PRESCRIBING THE HIGHER STANDARD IN ANOTHER SECTION?

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INTRODUCTION

When Congress drafted the Indian Child Welfare Act, it required two separate judicial findings in the any proceeding to terminate the parental rights of an Indian parent. First it required that the state "satisfy the court that active efforts have been made" to prevent the breakup of the Indian family and that those efforts have been unsuccessful (the "active efforts" requirement of 25 U.S.C. §1912(d)). Second, it required that the state prove *beyond a reasonable doubt* that the child would suffer "serious physical or emotional damage" if the child continued in the custody of the Indian parent (the "serious damage" element of 25 U.S.C. 1912(f)).

The state trial court declined to extend the beyond a reasonable doubt standard beyond the "serious damage"

requirement, the only ICWA provision for which Congress required the law's highest burden. Citing this Court's precedent in *Santosky v. Kramer*, 455 U.S. 745 (1982), the trial court applied the "clear and convincing evidence" middle burden of proof to the active efforts requirement of ICWA.

Neither the plain language of the ICWA statute nor the basic tenets of statutory construction support Petitioner's argument that Congress intended the beyond reasonable doubt standard to apply to all ICWA termination of parental rights findings. Accordingly, the higher burden for the ICWA serious damage requirement does not require this Court to revisit *Santosky* and require the highest standard of proof for the active efforts determination. The *Santosky* Court's due process analysis under *Mathews v. Eldridge*, 424 U.S. 319 (1976), which resulted in adoption of the clear and convincing evidence constitutional standard for termination of parental rights is unaffected by ICWA's requirement of a higher burden on the serious damage factor alone. To the contrary, Congress' enactment of the Adoption and Safe Families Act (ASFA) suggests, if anything, that the state's interest in providing permanent homes for children in its care has become more critical than at the time *Santosky* was decided.

Finally, the Petitioner overstates the degree to which the lower courts have disagreed over whether to apply the *Santosky* clear and convincing evidence standard or the beyond reasonable doubt standard for ICWA active efforts determinations. Only one state's highest court has held that the beyond reasonable doubt standard should be applied and that court eschewed any analysis of the ICWA statutory language. Moreover, virtually every court that has considered the issue since ASFA was enacted has applied the *Santosky* middle standard of proof rather than the highest burden.

STATEMENT OF THE CASE

Branden F. was born on October 20, 1998 with cocaine in his system (P-App. A-2) . The Bureau of Milwaukee Child Welfare placed him in foster care shortly thereafter due to his mother's drug and alcohol problems. He has resided with his adoptive parents since he was two months of age.

In compliance with the federal Indian Child Welfare Act, the Bureau first contacted Petitioner's tribe, the White Earth Band of Minnesota Chippewa, in November, 1998 to inquire about his eligibility for membership in the tribe (P-App. A-5). The tribe denied Branden's eligibility in two separate letters (*Id.*) The tribe showed no interest in Branden until after the State filed a petition for termination of parental rights (hereinafter "TPR") in June, 2002.

Petitioner exercised her right to a jury trial on the alleged grounds for termination of her parental rights, "failure to assume parental responsibility," Wis. Stat. §48.415(6). The jury trial took place in May, 2004. During the trial, the trial court ruled that in accordance with this Court's holding in *Santosky v. Kramer*, 455 U.S. 745 (1982), the State was required to prove the "active efforts" element required by 25 U.S.C. §1912(d) by clear and convincing evidence. (P-App. A-10). The jury answered the 1912(d) verdict questions and the state TPR unfitness grounds verdict question in the affirmative (P-App. E-1, E-2). The jury also found that the state had proved beyond a reasonable doubt the "serious physical or emotional harm" verdict question required by 25 U.S.C. §1912(f) (*Id*). At the conclusion of the June 24, 2004 dispositional hearing, the trial court found that termination of Petitioner's parental rights was in Branden's best interests and granted the TPR Order (P-App. A-4).

Petitioner appealed the order terminating her parental rights to the Wisconsin Court of Appeals, citing, among other things, the trial court's use of the clear and convincing standard for the "active efforts" element of proof. In an unpublished opinion of March 22, 2005, the Wisconsin Court of Appeals rejected her challenge to the standard of proof used by the trial court in relation to 25 U.S.C. §1912(d). The Court concluded that because Congress had clearly specified the beyond a reasonable doubt standard for §1912(f), but omitted that requirement for §1912(d), the trial court correctly applied accepted rules of statutory construction in finding that Congress had not intended to apply the highest burden of proof to §1912(d) (P-App. A-10).

Petitioner requested review of the Court of Appeals decision by the Supreme Court of Wisconsin, again arguing that the trial court employed the improper standard of proof to the active efforts element of §1912(d). The Supreme Court of Wisconsin denied her Petition for Review on June 1, 2005 (P-App. B-1, B-2).

Branden was adopted by the foster parents with whom he lived since two months of age on July 7, 2005.

REASONS FOR DENYING THE PETITION

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE PLAIN LANGUAGE OF 25 U.S.C. 1912(d) DOES NOT GRANT PETITIONER THE PROCESS SHE CLAIMS IS DUE.

A. Neither the Language of §1912(d) Nor the BIA Guidelines for State Courts Suggest a Beyond a Reasonable Doubt Standard of Proof.

Nothing in the plain language of 25 U.S.C. §1912(d) suggests the highest standard of proof for the active efforts requirement in an ICWA TPR case:

> Any party seeking to effect a ... termination of parental rights to ... an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. (Emphasis added).

On the contrary, the phrase "satisfy the court" implies that Congress intended a much lower evidentiary threshold than "beyond a reasonable doubt" urged by Petitioner. Only one state court has addressed this issue by examining the plain meaning of the word "satisfy." The Idaho Supreme Court concluded: "(u)nless a contrary purpose is clearly indicated, ordinary words are given their ordinary meaning when construing a statute. (Citation omitted) We cannot say that the ordinary meaning of the word satisfy is to convince "beyond a

reasonable doubt." *In the Matter of Baby Boy Doe*, 902 P.2d 477, 482 (Ida. 1995).

As noted by Petitioner, the Bureau of Indian Affairs Guidelines for State Courts (BIA Guidelines) have been accepted as persuasive authority by this Court (Petitioner's Brief, p. 14, f.n. 1). However, the language in the BIA Guidelines also gives no support for use of the highest standard of proof in the active efforts determination:

> Any party petitioning a state court for ... termination of parental rights to an Indian child must demonstrate to the court that prior to the proceeding active efforts have been made ... (Emphasis added).

BIA Guidelines, D.2., 44 Fed. Reg. 67,592, (R-App. A-1).

Neither phrase evokes the certainty of judgment necessary for the highest standard of proof.

The active efforts requirement is important, but unlike the serious damage determination, it is not intended to be of critical evidentiary significance. According to the Commentary to the BIA Guidelines, establishing detailed procedures and criteria to measure the adequacy of rehabilitation efforts "would involve the court second-guessing the professional judgment of social service agencies. The Act does not contemplate such a role for the courts and they generally lack the expertise to make such judgments." 44 Fed. Reg. 67,592 (November 26, 1979) (R-App. A-2). If the BIA does not deem that state courts are qualified to even "second-guess" states' rehabilitation efforts, it could not recommend judgment beyond a reasonable doubt.